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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RUDOLPH MICHAEL HERNANDEZ, JR., Defendant and Appellant.	D074900 (Super. Ct. No. RIF1501360)

APPEAL from a judgment of the Superior Court of Riverside County, Mac R. Fisher, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Rudolph Hernandez, Jr., guilty of one count of knowingly possessing or controlling child pornography (Pen. Code,[1] § 311.11, subd. (a)) after police found 50 images of child pornography and 72 images of child erotica on his home computer. After Hernandez admitted 12 prior convictions for committing lewd or lascivious acts on two children under 14, the trial court sentenced him under the Three Strikes Law to 25 years to life.

On appeal, Hernandez contends (1) the trial court erred by denying his motion to suppress evidence retrieved from his computer because the affidavit supporting the search warrant was based on stale information and contained information specifically negating probable cause; (2) the trial court erred by failing to instruct the jury that the charged offense requires that a defendant *knowingly* possess or control child pornography; (3) insufficient evidence supports the jury's finding that he knowingly possessed or controlled child pornography; and (4) the trial court erred by denying his requests to reduce his felony conviction to a misdemeanor, to strike his strike priors under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), and to grant him probation. These contentions all lack merit. Accordingly, we affirm.

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1 Further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Overview

In late 2014, Hernandez's 16-year-old niece, Jane Doe,[2] disclosed that Hernandez had sexually abused and taken nude Polaroid photographs of her when she was younger. Following an investigation, detectives with the Riverside Police Department's Sexual Assault Child Abuse Unit sought a search warrant for Hernandez's computer and related items.

The supporting affidavit authored by one of the detectives summarized interviews of Jane Doe, her mother, and another of Hernandez's nieces (J.C.). According to the affidavit, Hernandez had been convicted in the 1990's of committing lewd or lascivious acts on children; Jane Doe recently reported he had sexually abused and taken nude Polaroid photographs of her about 11 years earlier; Hernandez was known to photograph relatives' children "to the point where it made the entire family uncomfortable"; his bedroom door frame was lined with photographs of children; J.C. saw old Polaroid photographs in Hernandez's room and scanned into his computer; and J.C. had recently seen the same computer at Hernandez's residence. Based on his experience and training, the affiant-detective opined Hernandez was "the type of preferential child molester who keeps/views child pornography in his possession." A magistrate issued a search warrant for Hernandez's computer and related items. Police seized the computer and found images of child pornography and child erotica.

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[2] At the trial court's direction, the reporter's transcripts refer to the victim as Jane Doe. We, too, will do so.

As a result of Jane Doe's complaint and the search of Hernandez's computer, the People initially charged 47-year-old Hernandez with one count of committing lewd or lascivious acts (§ 288, subd. (a)) on Jane Doe and one count of knowingly possessing or controlling child pornography (§ 311.11, subd. (a)).[3] Eventually, the People dismissed the sexual abuse count and pursued only the child pornography count. The operative charging document alleged Hernandez had suffered 12 strike prior convictions in the 1990's for committing lewd or lascivious acts on two victims under 14.

The prosecution's primary trial witness was a detective experienced in computer forensic analysis who had examined Hernandez's computer. Based on numerous "dominion and control" documents found on the computer, the detective determined Hernandez was the primary user. Using specialized software, the detective sifted through hundreds of thousands of files on Hernandez's computer and found 50 images of child pornography and 72 images of child erotica. The images were found in "unallocated" disk space, meaning they had been marked for deletion from the hard drive but had not yet been overwritten with new data. The detective ruled out innocent explanations for how the child pornography could have ended up on the computer (e.g., computer viruses or pop-up ads). He also found evidence indicating Hernandez had unnecessarily created and deleted 100 user accounts in an effort to conceal his activities on the computer.

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3 "[A]s a matter of law, [simultaneous] possession of multiple images constitutes one violation of section 311.11, subdivision (a)." (*People v. Mahoney* (2013) 220 Cal.App.4th 781, 796 (*Mahoney*).)

The prosecution also introduced Hernandez's prior convictions for committing lewd and lascivious acts on children, which the trial court admitted both as propensity evidence and for impeachment.

Hernandez testified and denied any knowledge of the child pornography found on his computer. He claimed a dozen people had access to the computer, and that he had given many of them his password.

The jury found Hernandez guilty, and the trial court sentenced him to prison for 25 years to life.

The Prosecution Case

On February 12, 2015, detectives with the Riverside Police Department executed a search warrant at the home in which Hernandez lived with his elderly parents (the Residence). The detectives seized every item capable of storing digital information, including a Macintosh desktop computer (Mac) located in Hernandez's room. The detectives testified as to the chain of custody for the seized property.

Detective Daniel Olsen, a computer digital examiner in the Riverside Police Department's Computer Forensics Unit, testified he had received 500 hours of forensic examination training, and had conducted over 900 such examinations, including about 30 involving child pornography. He began forensically examining the Mac the day it was seized.

Detective Olsen used specialized software to make an exact copy of the Mac's hard drive, then loaded that copy into special forensic examination software that can access current files as well as files that have been marked for deletion from the hard drive

but have not yet been overwritten with new data. Olsen noted it is a common misconception that deleting a file actually removes it from the hard drive, and stated that deleting the file merely tells the hard drive that this file space is now "unallocated" and available to be overwritten with new data. Analogizing to a library card catalog, Olsen explained that deleting a file merely "remove[s] the card from the catalog; it doesn't actually remove the book from the bookshelf. So if you went and looked at the bookshelf, you'd still find the book there." Further extending the analogy, Olsen explained that his forensic software "doesn't go to the card catalog and look for the files; it goes to the bookshelf [and] sees what books are still in the bookshelf that aren't in the card catalog anymore."[4]

During his analysis, Detective Olsen found several " 'dominion and control' " documents indicating the Mac belonged to Hernandez. For example, a will in Hernandez's name identified the Mac by serial number and photograph; medical records identified Hernandez by name and date of birth; and several receipts identified Hernandez by name, address, and the email address "Project107Music@Hotmail.com."[5] Based on his examination of these and other files, Olsen offered his "expert opinion" that Hernandez "was the primary user of [the Mac]."

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[4] Detective Olsen explained there are more elaborate means of deleting files that will actually remove the file from the hard drive, rather than merely removing the catalog reference to the file's location. Although the Mac was equipped with a program capable of performing this form of deletion, the program had not been activated.

[5] Hernandez would later testify he was a producer in the music and television industries.

Detective Olsen determined the Mac was first set up in 2011, and the first user account—"Project107Music," associated with the name "JR Michaels LTD Productions"—was created the following month.[6] The Project107Music user account and one "guest" account were active on the Mac when Olsen examined it. Olsen found 100 deleted user accounts that had names that "just seemed to be random characters" (as opposed to giving some meaningful indication of the user's real name). Olsen explained that when a user account is deleted, all stored data (including Internet history and "any personal documents") associated with that account is deleted.

Olsen testified he had never seen so many deleted user accounts on a computer, which he found "pretty unusual" due to the time and effort involved in creating a user account. The only reason Olsen could think of for creating and deleting so many user accounts "would be if you were going to do something that you didn't want other people who use that computer to see or find."

The parties stipulated that Detective Olsen discovered on the Mac 50 images "depict[ing] minors engaging in or simulating sexual conduct, commonly defined as child pornography"; and "approximately 72 images depict[ing] minors wearing little or no clothing and exposing their genitals, penis, and/or breasts," which Olsen characterized as "child erotica." Olsen discovered the files in unallocated disk space, indicating they had

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6 Olsen explained that a "[u]ser account is basically a relationship between a person and a computer. A user account has a user name associated with it. And when you access a computer using that user name and generally a password, then you're able to save stuff to the hard drive or to the computer that other users of the same computer wouldn't be able to access if they're using different user names."

been deleted but not yet overwritten with new data. Five of the 50 child pornography images were introduced as trial exhibits.[7]

Detective Olsen found that the Mac had retained only two days of Internet history,[8] none of which pertained to child pornography. The limited history suggested to Olsen that someone had recently deleted the earlier history. Olsen found no bookmarks to child pornography websites in either of the two web browsers on the Mac. Olsen did find about one year's worth of Internet "cache,"[9] but none of the stored files contained images of child pornography or child erotica. Olsen explained that if a Web browser is used in "private mode," it will not save the user's Internet history or store files to the cache.

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7 These exhibits are not in the appellate record, but the trial court described them in pretrial proceedings as including "nude photos of children[,] . . . children engaging in sexual conduct with other children[,] and children engaging in sexual conduct with adults." The sexual conduct ran the whole "gamut," including intercourse and oral sex.

8 Olsen described "Internet history" as "a record of sites, locations on the Internet, that you've visited. And it generally includes the site's name, the Internet address of the site, as well as the date and time that you visit it."

9 " 'A cache (pronounced "cash") is a storage mechanism designed to speed up the loading of Internet displays. When a computer user views a webpage, the web browser stores a copy of the page on the computer's hard drive in a folder or directory. That folder is known as the cache, and the individual files within the cache are known as temporary Internet files. When the user later returns to a previously visited webpage, the browser retrieves the cached file to display the webpage instead of retrieving the file from the Internet. By retrieving the page from the cache, instead of the Internet, the browser can display the page more quickly.' " (*Tecklenburg v. Appellate Division* (2009) 169 Cal.App.4th 1402, 1407, fn. 7 (*Tecklenburg*).)

Detective Olsen acknowledged there are computer viruses that can put child pornography on a computer. However, there were no viruses on the Mac, it had no virus-protection software, and the amount of child pornography on the Mac was much more than Olsen would expect from a virus.

On cross-examination, Detective Olsen acknowledged the Mac's hard drive contained "close to 5,000 movies" and "290,000 pictures" that had not been deleted, none of which contained child pornography. Moreover, of the approximately 85,000 deleted files, Olsen located only the 50 child pornography and 72 child erotica images noted above.

Detective Olsen explained that because the subject images were discovered in unallocated space and had no file names or other identifying information, he was unable to determine "the source for those images," "who had put them on [the Mac]," "when they had been put on," "when they had been deleted," or "if anyone even saw these images prior to their deletion." Olsen further explained that because the images were stored in unallocated disk space, a user would be unable to access them without forensic software. Olsen found no such software on the Mac.

Detective Olsen determined that more than one dozen devices (e.g., iPhones, iPods, etc.) had been connected to the Mac over the years, but he was unable to determine whether the subject images originated on any of those devices. He found backups of a cellphone associated with Hernandez, but the files contained no child pornography. Olsen found no child pornography on any of the other seized storage devices, although he

was unable to examine one 1.5 terabyte external hard drive because it had suffered a hardware failure.

The parties stipulated that in 1995, Hernandez was convicted of committing lewd or lascivious acts on two boys under the age of 14 in violation of section 288, subdivision (a). The trial court admitted these convictions as both propensity evidence under Evidence Code section 1108, subdivision (a), and for impeachment.[10]

The Defense Case

Hernandez was the sole defense witness. He testified he owned the Mac from 2011 until the police seized it in February 2015. During this period, Hernandez lived with his parents. One of his nieces, J.C., lived with them for one summer. Hernandez said 12 other people (family members, friends, and coworkers) had access to the Mac, and many of them had the password for the primary user account.

Hernandez denied ever seeing the five child pornography images admitted as trial exhibits. He further denied knowing they (or the other images) were on his computer, or doing anything that, "to [his] knowledge, would have led those files to be found in the deleted space . . . of the computer."

On cross-examination, Hernandez acknowledged creating additional user accounts, but claimed it was fewer than 10. He initially said he deleted them for "[n]o particular reason," but then added that they took up storage space, which he needed for his job producing videos for television and music. Hernandez said his assistant (a female

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10 Hernandez does not challenge these rulings.

in her early 20's) had access to the Mac during the time many of the user accounts were created and deleted.

Jury Verdict and Sentencing

The jury found Hernandez guilty of violating section 311.11. In a bifurcated proceeding, Hernandez admitted the 12 strike prior allegations. After denying Hernandez's requests to reduce the felony conviction to a misdemeanor and to strike the strike priors under *Romero*, the trial court sentenced him under the Three Strikes Law to prison for 25 years to life.

DISCUSSION

I. *Motion to Suppress*

Hernandez contends the trial court erred by denying his motion to suppress the images seized from the Mac under the search warrant. He maintains the affidavit in support of the warrant failed to establish probable cause because it was based on stale information and contained information specifically negating probable cause. We disagree.

A. *Background*

1. *The Search Warrant*

On February 9, 2015, Riverside Police Detective Everth Bercian applied for a warrant to search Hernandez's computer and related materials. He supported the application with a four-and-a-half page, single-spaced, probable cause affidavit.

Detective Bercian described his professional background. He had been a sworn peace officer since 2006, and was assigned to his department's Sexual Assault Child

Abuse Unit. He had attended a 40-hour training course on child abuse/sexual assault and an eight-hour sexual assault investigator update course. He had investigated "numerous cases involving sexual assault of adults and children," and "worked with numerous experienced [d]etectives who specialize in investigating sexual assaults and child abuse." He had "also spoken to several sexual predators and learned their motivation(s) behind the crimes they committed."

The investigation began in December 2014 after 16-year-old Jane Doe had recurring nightmares that led to recollections of Hernandez sexually abusing her when she was about four years old. Detective Bercian's affidavit summarized an interview of Jane Doe conducted by Riverside Police Officer Paes. Jane Doe stated Hernandez "had taken nude pictures of her at [the Residence] with a Polaroid type camera" when "she was in the care of her grandmother, but her grandmother left the home and left [Hernandez] in charge of her care." Jane Doe remembered that after Hernandez took the pictures, he placed them in a brown lock box that "had yellow dots on the front and small numbers to unlock it." When Hernandez opened the box, Jane Doe "saw naked photographs of other little girls inside." Jane Doe reported that Hernandez also touched her vagina and told her, " 'We will always have a special bond.' "

Detective Bercian also summarized a subsequent interview of Jane Doe by a child protective services forensic interviewer. Jane Doe told the interviewer substantially the same story she had told Officer Paes.

The affidavit then described Detective Bercian's interview of Jane Doe's mother, who was Hernandez's sister (Sister). When Sister would occasionally allow her mother

(also Hernandez's mother (Mother)) to babysit Jane Doe, Sister gave "clear guidelines" that Mother was not to leave Jane Doe alone with Hernandez due to his prior convictions.

Sister also told Detective Bercian "there were some things she thought were weird about" Hernandez. He "would place pictures of children around the door frame of his room. She did not know who some of the children were, but she believed the pictures were of children who used to be taken care of when [Mother] and [Hernandez] ran a daycare center at their home." Hernandez also would take pictures of relatives' children during family events "to the point where it made the entire family uncomfortable." Sister said Hernandez had a Mac in his bedroom that she last saw a few months earlier.

Detective Bercian also described his interview of Hernandez's 22-year-old niece, J.C. She said she lived at the Residence for six or eight months while she was going to community college when she was 18. She stayed in a den that Hernandez used as his bedroom, which he vacated for her. Hernandez left many of his belongings in the den.

J.C. also told Detective Bercian that "when she was younger she remembers Polaroid pictures being posted up in the room she was in." While she was staying at the Residence, "she found some of the old Polaroid pictures throughout the room."

Hernandez would let J.C. use his Mac to do schoolwork. She said he was "technologically savvy" and "had a complex password to the computer and he would help her gain access . . . ." On the computer, J.C. saw "photos [that] appeared to be old and had been scanned into the computer." Some of the scanned pictures were the Polaroids she had seen when she was younger, but others were not. Some of the scanned pictures

"were of [J.C.] from when she was a child . . . which she had not seen before." J.C. last saw the Mac at the Residence about two weeks before the warrant application.

Detective Bercian stated in the affidavit that Hernandez is on the sex offender registry due to 1995 convictions for committing lewd or lascivious acts on a child under 14 (§ 288, subd. (a)). Based on his training and his experience, Bercian opined Hernandez was a "preferential child molester," which Bercian defined as "a person whose primary sexual interest is in children." Bercian further stated that "[p]referential child molesters receive sexual gratification from actual contact with children and also from fantasies involving children, including the use of photographs and other electronic media . . . ." They "tend[] to record [their] fantasies and/or activities in order to relive them," and they "rarely, if ever, dispose of such material, as it is treated as highly prized possessions." These molesters "often use the computer" to access and store "illegal images." Based on his training and experience, Bercian concluded Hernandez "is the type of preferential child molester who keeps/views child pornography in his possession."

The trial court issued a search warrant for Hernandez's computer and related items.

2. *The Motion to Suppress*

Before trial, Hernandez moved to traverse the search warrant and suppress all the evidence obtained under it. Hernandez argued Detective Bercian's affidavit failed to establish probable cause because it was based on Jane Doe's stale complaint.[11]

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11 Hernandez's motion also challenged the bases of Detective Bercian's opinions regarding preferential child molesters, and accused Bercian of failing to highlight alleged discrepancies between Jane Doe's statements to Officer Paes and the forensic interviewer. Hernandez does not raise these issues in this appeal.

The prosecutor opposed the motion, arguing the affidavit provided probable cause because J.C.'s observation of Polaroid photos in Hernandez's room corroborated Jane Doe's allegation; J.C. saw scanned Polaroid photos on Hernandez's computer; J.C. recently saw the computer; and Detective Bercian opined Hernandez was a preferential child molester who likely retained any child pornography he possessed.

After hearing argument, the trial court denied Hernandez's motion. The court concluded the magistrate could reasonably have found Detective Bercian's affidavit established probable cause based on Jane Doe's original complaint, J.C.'s observation of Polaroid photos in Hernandez's room and on his computer, and Bercian's expert opinion regarding preferential child molesters.

B. *Relevant Legal Principles*

"The pertinent rules governing a Fourth Amendment challenge to the validity of a search warrant, and the search conducted pursuant to it, are well settled. 'The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' [Citations.] 'The test for probable cause is not reducible to "precise definition or quantification." ' [Citation.] But . . . it is ' "less than a preponderance of the evidence or even a prima facie case." ' [Citation.] ' "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay

information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ' [Citations.] 'The magistrate's determination of probable cause is entitled to deferential review.' [Citations.] . . . [T]he warrant 'can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence' supporting the finding of probable cause." (*People v. Westerfield* (2019) 6 Cal.5th 632, 659 (*Westerfield*); see *People v. Carrington* (2009) 47 Cal.4th 145, 161 (*Carrington*).) "Doubtful or marginal cases are resolved in favor of upholding the warrant." (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278; see *People v. Eubanks* (2011) 53 Cal.4th 110, 133.)

C. *Analysis*

Considering the totality of circumstances, we conclude " 'the magistrate had a substantial basis for concluding a fair probability existed that a search' " of Hernandez's Mac " 'would uncover wrongdoing.' " (*Westerfield*, *supra*, 6 Cal.5th at p. 659.)

Detective Bercian's affidavit established probable cause that Hernandez possessed child pornography on his computer *at some time*. Sixteen-year-old Jane Doe recently reported that when she was four Hernandez had sexually abused her, taken nude Polaroid photographs of her, and stored those photographs in a lockbox that contained nude photographs of other children. Jane Doe described the lockbox in detail and did so consistently in multiple interviews. Sister told Bercian that Hernandez behaved "weird[ly]" by lining his bedroom door frame with photographs of children and by photographing relatives' children during family events "to the point where it made the entire family uncomfortable."

The affidavit indicated Hernandez was a registered sex offender due to his prior convictions for committing lewd or lascivious acts on minors. The magistrate was entitled to consider this criminal history when determining probable cause. (*People v. Aho* (1985) 166 Cal.App.3d 984, 992.) Indeed, under Evidence Code section 1108, evidence that a defendant has committed a lewd or lascivious act on a minor (§ 288) is admissible—*even at trial*—to show a propensity to knowingly possess or control child pornography (§ 311.11).[12] The magistrate was further entitled to indulge this inference in light of Detective Bercian's opinion that Hernandez is the type of child molester who is likely to possess child pornography on his computer. (See *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1103 (*Varghese*) ["A magistrate may reasonably rely on the special experience and expertise of the affiant officer in considering whether probable cause exists."]; *People v. Williams* (2017) 15 Cal.App.5th 111, 125 (*Williams*).)

Detective Bercian's affidavit also established probable cause that Hernandez *still* possessed child pornography. "Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search

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12 Under Evidence Code section 1101, subdivision (a), " ' "[e]vidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition . . . ." ' " (*People v. Thomas* (2011) 52 Cal.4th 336, 354.) However, " 'the Legislature enacted [Evidence Code] section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases.' " (See *People v. Abilez* (2007) 41 Cal.4th 472, 502.) Evidence Code section 1108, subdivision (a) states: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." For purposes of Evidence Code section 1108, a "[s]exual offense" is "[a]ny conduct proscribed by . . . Section . . . 288 . . . [or] . . . 311.11 . . . ." (Evid. Code, § 1108, subd. (d)(1)(A).)

warrant is supported by probable cause." (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.) "The question of staleness concerns whether facts supporting the warrant application establish it is substantially probable the evidence sought will *still* be at the location at the time of the search." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 370.) "No bright-line rule defines the point at which information is considered stale. [Citation.] Rather, 'the question of staleness depends on the facts of each case.' [Citation.] 'If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.' " (*Carrington*, *supra*, 47 Cal.4th at pp. 163-164.) Similarly, "[s]ubstantial delays do not render warrants stale where the defendant is not likely to dispose of the items police seek to seize." (*People v. Stipo* (2011) 195 Cal.App.4th 664, 672 (*Stipo*).)

Considering these principles, we conclude the magistrate had a substantial basis for concluding Hernandez still possessed the child pornography at the time the magistrate issued the warrant. In his affidavit, Detective Bercian recounted his interview of Hernandez's niece, J.C., who recalled seeing Polaroid pictures of children in Hernandez's room when she was young. Later, when she stayed in his room while attending community college, she found some of the old Polaroid pictures throughout the room. Moreover, when she used Hernandez's computer for schoolwork—with his assistance, because he was "technologically savvy" and had a complex password—J.C. saw old pictures that had been scanned in (including some of her as a child that she had never seen before). Although J.C. made these observations about four years before the warrant

application, she told Bercian she had seen Hernandez's computer at the Residence about two weeks earlier.

Detective Bercian's expert opinions further support the conclusion Hernandez presently possessed child pornography. Bercian detailed his training and experience regarding child sexual abuse investigations, which included speaking with "several sexual predators and learn[ing] their motivation(s) behind the crimes they committed." Based on this training and experience, Bercian opined Hernandez "is the type of preferential child molester who keeps/views child pornography in his possession" and "rarely, if ever, dispose[s] of such material." Detective Bercian stated his qualifications and opinions in sufficient detail in the affidavit for the magistrate to properly rely on them. (*Varghese*, *supra*, 162 Cal.App.4th at p. 1103; *Williams*, *supra*, 15 Cal.App.5th at p. 125.)

Taken together, these circumstances provided the magistrate a substantial basis for concluding Hernandez's computer *still* contained child pornography.

Hernandez's arguments to the contrary do not persuade us otherwise. He argues primarily that no published opinion has upheld a probable cause finding based on an incident occurring 11 years earlier. Indeed, even the Attorney General acknowledges "delays of more than four weeks are *generally* considered insufficient to demonstrate present probable cause." (Italics added.) However, both parties acknowledge that our high court has held " 'the question of staleness depends on the facts of each case.' " (*Carrington*, *supra*, 47 Cal.4th at p. 163.) The facts of *this* case—including J.C.'s more recent observations regarding Polaroid pictures in Hernandez's room, scanned images of old pictures on his computer, and Detective Bercian's expert opinions—support the

finding that Hernandez likely continued to possess child pornography despite the passage of time. (See *Stipo*, *supra*, 195 Cal.App.4th at p. 672 ["Substantial delays do not render warrants stale where the defendant is not likely to dispose of the items police seek to seize."].)

We find unpersuasive Hernandez's characterization of Detective Bercian's opinions as "boilerplate recitations" that are "virtually in haec verba with the counterpart allegations in child pornography search warrants sought by the Riverside Police Department for the past 10 years." First, Hernandez cites no evidence in the record to support this conclusion. Second, even if the assertion were true, the fact that Detective Bercian has maintained the same opinions over the course of several years would not undermine those opinions. Moreover, Bercian's opinions were substantiated in part by J.C.'s more recent observations of pictures in Hernandez's room and on his computer. (See, e.g., *People v. Nicholls* (2008) 159 Cal.App.4th 703, 711-712 ["the search warrant application did not depend solely on the expert's opinion about activities of child molesters, but the expert opinion together with the victim's statements, defendant's storage of his computer in a garage attic, and his expressed concern that no one 'mess' with the computer."].)

Citing a law review article, Hernandez asserts that the substance of Detective Bercian's opinions regarding child molesters is subject to scientific debate. (See Weissler, *Head Versus Heart: Applying Empirical Evidence About the Connection Between Child Pornography and Child Molestation to Probable Cause Analyses* (2013) 82 Fordham L.Rev. 1487, 1517.) However, Hernandez did not provide this (or similar)

authority to the trial court, nor does he provide us any authority indicating the courts are bound by opinions expressed in law review articles over those expressed by qualified affiants.

Hernandez cites *United States v. Lacy* (9th Cir. 1997) 119 F.3d 742 as an example of a court being "unwilling to assume that collectors of child pornography keep their materials indefinitely." (*Id.* at p. 746.) However, the *Lacy* court nonetheless upheld a search warrant where, as here, the probable cause affidavit included additional evidence corroborating the law enforcement affiant's opinions regarding the retention habits of collectors of child pornography. And, in any event, *Lacy* is not binding on us and appears to state the minority view among federal appellate courts. (See *United States v. Richardson* (4th Cir. 2010) 607 F.3d 357, 370 ["In the context of child pornography cases, *courts have largely concluded* that a delay—even a substantial delay—between distribution and the issuance of a search warrant does not render the underlying information stale. *This consensus* rests on the *widespread view* among the courts—in accord with [the law enforcement affiant]'s affidavit—that 'collectors and distributors of child pornography value their sexually explicit materials highly, "rarely if ever" dispose of such material, and store it "for long periods" in a secure place, typically in their homes.' "].)

In an unrelated argument raised for the first time on appeal, Hernandez argues Detective Bercian's affidavit could not have established probable cause because Jane Doe's allegations are irreconcilably negated by Sister's explanation that she took precautions to ensure Jane Doe was never left alone with Hernandez. We need not

address the Attorney General's claim that Hernandez forfeited this argument by failing to raise it below, because the argument readily fails on its merits. First, Jane Doe's and Sister's accounts are not necessarily irreconcilable. It is entirely possible both that Sister told Mother not to leave Jane Doe alone with Hernandez, and that Mother did so anyway. Alternatively, the magistrate could simply have disregarded Sister's accounting as an understandable (if not subconscious) attempt to minimize any parental guilt for what allegedly happened to Jane Doe.

In sum, Detective Bercian's affidavit provided a substantial basis for the magistrate to conclude that Hernandez presently possessed child pornography on his computer. Accordingly, the trial court properly denied Hernandez's motion to suppress.

II. *The Jury Was Properly Instructed Regarding the Knowledge Requirement*

Hernandez contends the trial court denied him due process and a fair trial by failing to instruct as an element of the offense the mens rea of knowledge that the child pornography was on his computer. We conclude the jury was properly instructed.

A. *Background*

Hernandez was charged with violating section 311.11, subdivision (a), which states in pertinent part:

> "Every person who *knowingly possesses or controls* any matter, representation of information, data, or image . . . that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct, . . . is guilty of a felony . . . ." (Italics added.)

The trial court and the parties agreed that CALJIC No. 10.83 was the proper pattern jury instruction for this offense. The instruction reads in part:

> "Every person who *knowingly possesses or controls* any matter, representation of information, data, or image . . . that contains or incorporates in any manner, . . . the production of which depicts a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 personally engaging in or simulating sexual conduct, is guilty of violating section 311.11, subdivision (a), of the Penal Code, a crime. [¶] . . . [¶]
>
> "There are two kinds of possession: actual possession and constructive possession. 'Actual possession' requires that a person *knowingly* exercise direct physical control over a thing. 'Constructive possession' does not require actual possession but does require that a person *knowingly* exercise control over or the right to control a thing, either directly or through another person or persons.
>
> "In order to prove this crime, each of the following elements must be proved:
>
> "1. A person *possessed* or controlled any matter, representation of information, data, or image . . . that contained or incorporated in any manner, . . . the production of which involved the use of a person under the age of 18 years personally engaging in or simulating sexual content; and
>
> "2. The person who possessed or controlled that matter *knew that a person depicted* engaging in or simulating sexual conduct *was under the age of 18 years*." (Italics added.)

During the jury instruction conference, defense counsel expressed concern that, although the introductory paragraph defines the offense as "*knowingly* possess[ing] or control[ling]" child pornography, the first element seems to have "lost . . . 'knowingly' somewhere in there." (Italics added.) By contrast, the second element expressly states a knowledge requirement, but it relates only to the age of the person depicted in the image. As a result, counsel was concerned the instruction addressed "knowledge of the age as

opposed to the knowledge of the possession or control." Counsel acknowledged, however, that both the introductory paragraph and the definitions of "possession" included a knowledge requirement. Nevertheless, counsel asked the court to insert the word "knowingly" before "possessed or controlled" in the first element.

The trial court expressed its initial view that the pattern instruction accurately states the law, but the court directed the parties to research the issue and advise the court accordingly.

The next day, defense counsel reiterated his request to modify the instruction, but submitted on the issue without providing any authority for the modification. The court denied the request and gave the instruction as indicated.

In closing argument, the prosecutor argued Hernandez knowingly possessed child pornography at some time "because he deleted" it from his computer. Defense counsel's closing argument tracked the language of CALJIC No. 10.83 and "highlighted . . . the *knowing* part . . . . He must *know* that [the images] are there and *know* that he has control over them." (Italics added.)

B. *Relevant Legal Principles*

"A trial court has a sua sponte duty to instruct on all of the elements of a charged offense [citations], including the mental state required to commit the offense and the union of that mental state and the defendant's act [citations]." (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1160; see *People v. Merritt* (2017) 2 Cal.5th 819, 824 (*Merritt*).) "[A]lthough a specific element is not expressly recited in an instruction, it may

nonetheless be implicit in the instructional language used." (*People v. Mena* (2005) 133 Cal.App.4th 702, 706 (*Mena*).)

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "When a jury instruction is ambiguous, the reviewing court examines the record to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied the instructional language." (*Mena, supra,* 133 Cal.App.4th at p. 706.) In determining whether instructional error has occurred, we consider the instructions as a whole and assume jurors are intelligent persons, capable of understanding and correlating all given instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*Ibid*.)

An instruction that omits an element of an offense from consideration by the jury is subject to harmless error review under the *Chapman* "beyond a reasonable doubt" standard of prejudice. (*People v. Sakarias* (2000) 22 Cal.4th 596, 625, citing *Chapman v. California* (1967) 386 U.S. 18, 24; *Merritt, supra*, 2 Cal.5th at p. 831.)

C. *Analysis*

On our independent review, we conclude CALJIC No. 10.83 adequately instructed the jury that it was required to find that Hernandez *knowingly* possessed or controlled child pornography before the jury could convict him of violating section 311.11. First, the first substantive paragraph of the instruction set forth verbatim the substantive provisions of section 311.11, subdivision (a), including the limitation that it applies only

to a "person who *knowingly* possesses or controls" child pornography. (Italics added.) Second, the first element of the instruction required the jury to find that the defendant "possessed or controlled" child pornography. Just above that element, the instruction defined two forms of possession, each of which required that the defendant "knowingly" possess or exercise control over an item. Reading these provisions together, it is not reasonably likely the jury concluded it could convict Hernandez of violating section 311.11 without finding that he *knowingly* possessed child pornography.

Hernandez argues that because the second element of the instruction includes an express knowledge requirement regarding age, the "jury would certainly have inferred from the absence of a knowledge requirement" in the first element "that in fact there was no requirement of proof of knowledge" as to possession or control. We disagree. For the reasons stated above, the instruction *as a whole* adequately instructed that the possession element incorporated a knowledge component.[13]

Even if the instruction left room for doubt, the closing arguments eliminated it. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220 [" 'any theoretical possibility of confusion [may be] diminished by the parties' closing arguments' "].) The jury was instructed that it was bound by the parties' stipulation that Hernandez's computer contained child pornography. (See CALCRIM No. 222 ["Because there is no dispute

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13 In this respect, CALJIC No. 10.83 is different than the instruction at issue in *People v. Singh* (2004) 119 Cal.App.4th 905 (on which Hernandez relies), where the instruction was completely silent as to a knowledge requirement for the offense of possessing methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1). (*Singh*, at p. 912 ["the trial court erred in failing to instruct the jury that defendant had to *knowingly* have the firearm available for immediate . . . use"].)

about those [stipulated] facts you must also accept them as true."].) The prosecutor and defense counsel both made clear in their closing arguments that the contested issue was whether Hernandez *knew* those images were on his computer, not whether he knew the age of the people depicted. This removed any theoretical confusion the jury may otherwise have experienced.

III. *Substantial Evidence Supports the Verdict*

Hernandez contends insufficient evidence supports the jury's finding that he *knowingly* possessed or controlled the child pornography that was undisputedly on his computer.[14] We disagree.

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also

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14 In his opening brief, Hernandez also contended the prosecution failed to establish he violated section 311.11 during the applicable *three-year* limitations period. In his reply brief, however, he acknowledges the applicable limitations period is *10 years*. (See *Mahoney*, *supra*, 220 Cal.App.4th at p. 790 [10-year statute of limitations].) There is no dispute that *if* Hernandez violated section 311.11, he was tried within 10 years of doing so. (See *People v. Obremski* (1989) 207 Cal.App.3d 1346, 1354 ["[w]here alibi is not a defense, the prosecution need only prove the act was committed before the filing of the information and within the period of the statute of limitations"]; § 955.)

reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

Substantial evidence supports the jury's finding that Hernandez knowingly possessed or controlled the child pornography found on the Mac. Hernandez admitted at trial that he owned the Mac since 2011. When the police executed the search warrant, they found the Mac in Hernandez's room. Detective Olsen found numerous "dominion and control" files indicating Hernandez owned the Mac. Olsen also found only a single active user account, with a name consistent with Hernandez's email address and job as a music and television video producer. This account was established in 2011, around the time Hernandez bought the Mac. Based on his review of these and other files on the Mac, Olsen opined Hernandez was the primary user of the Mac.

Detective Olsen also discovered 100 deleted user accounts on the Mac, which he testified was "pretty unusual" and suggestive of secretive activity. Olsen also found indications the Internet history had been recently deleted. For his part, Hernandez acknowledged he had created numerous additional user accounts (though he claimed it was fewer than 10), which he deleted for "[n]o particular reason." The jury was entitled to find Hernandez's explanation unconvincing and to accept this evidence of sophisticated concealment techniques as circumstantial evidence that Hernandez knowingly possessed or controlled the child pornography. (See *People v. Petrovic* (2014) 224 Cal.App.4th 1510, 1518.)

Detective Olsen opined it was unlikely the child pornography innocently ended up on the Mac. He explained that although computer viruses are capable of putting child pornography on a computer, the Mac had neither viruses nor antivirus software (which would have removed any viruses), and the number of pornographic images recovered from the Mac was inconsistent with a virus. Olsen also testified he had never seen or heard of a pop-up advertisement containing child pornography.

Hernandez's criminal history further supports the jury's finding that he knowingly possessed the child pornography. The trial court admitted his section 288 convictions under Evidence Code section 1108, which, as discussed in part I.C., *ante*, allowed the jury to conclude he was predisposed to also possess child pornography. This is powerful evidence that Hernandez knowingly possessed the child pornography on his computer. Yet, perplexingly, he makes almost no mention of this evidence in his briefing.

Hernandez argues this evidence falls short of that found sufficient in *Tecklenburg*, *supra*, 169 Cal.App.4th 1402. In *Tecklenburg*, police found child pornography in unallocated disk space on the defendant's home computer, which was kept in the kitchen and, at times, was used by the defendant and two of his teenage sons to access adult pornography. (*Id.* at pp. 1407, 1411-1412.) The prosecution's forensic computer analyst acknowledged that because "there were multiple users . . . [,] he could not state who accessed the images" of child pornography. (*Id.* at p. 1409.) Nevertheless, the appellate court found substantial evidence supported the jury's finding that the defendant knowingly possessed the child pornography based on (among other things) the fact police found similar child pornography images and search terms on the defendant's home

computer and computers to which he had access at work; the name of the defendant's email provider appeared on a search engine page through which searches for common child pornography search terms appeared; and, when confronted, the defendant spontaneously told police, " 'My life is over.' " (*Id.* at pp. 1409-1411, 1413-1414.) The court found this constituted substantial evidence the defendant possessed the child pornography despite the fact the files were recovered from the computer's cache or "temporary [I]nternet files," and regardless of whether the defendant was aware the files remained there. (*Id.* at p. 1419 ["In our view, the [temporary Internet files] or cache evidenced defendant's knowing possession or control of the images. There was no need for additional evidence that defendant was aware of the [temporary Internet files] or cache in order for defendant to have violated section 311.11, subdivision (a)."].)[15]

Whether the evidence of knowing possession was stronger in *Tecklenburg* than here is of no moment. "Reviewing the sufficiency of evidence . . . necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value." (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138; see *People v. Thomas* (1992) 2 Cal.4th 489, 516 ["When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts."].)

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15 In this regard, the *Tecklenburg* court distinguished section 311.11 from a federal law that requires knowledge that the files remain stored in the cache. (*Tecklenburg, supra,* 169 Cal.App.4th at pp. 1415-1416.)

But *Tecklenburg* is instructive—albeit unhelpful to Hernandez—in one material respect: it negates Hernandez's argument that the child pornography found on his computer was stored in unallocated disk space and no longer accessible without forensic software. That is, *Tecklenburg* found a violation of section 311.11 even where the defendant was unaware that deleted files were retained in unallocated space. (*Tecklenburg*, *supra*, 169 Cal.App.4th at p. 1419; see *Mahoney*, *supra*, 220 Cal.App.4th at p. 795 ["there is nothing in the jury instructions nor in any case construing section 311.11, subdivision (a) [as] containing . . . a requirement" that the defendant must have " 'had the ability to access, view, manipulate or modify' " the child pornography images when police seized his computer].) Indeed, consistent with this principle, Hernandez's counsel acknowledged during closing argument that the fact the images were found in unallocated disk space "is circumstantial evidence that, at some point in time, someone may have been in knowing possession of them." Based on the evidence discussed above, the jury was entitled to conclude it was Hernandez who possessed those images "at some point in time."

Hernandez advances other factual arguments, which we find unpersuasive in light of the jury's apparent rejection of them. For example, Hernandez argues "several other people had access to and used the computer." However, this evidence came primarily from Hernandez's own testimony, which the jury was entitled to reject, particularly in light of the fact he was impeached with his prior felony convictions. Hernandez also argues there were "comparatively few" child pornography files on the Mac. But Detective Olsen's testimony constitutes substantial evidence that the files—however

few—were not innocuously loaded onto the Mac, and the large number of other files could easily be explained by the nature of editing work Hernandez performed on the Mac.

In sum, substantial evidence supports the jury's finding that Hernandez knowingly possessed or controlled the child pornography found on his computer.

IV. *Sentencing Issues*

Hernandez contends we should remand for resentencing because the trial court relied on improper factors when it denied his requests to reduce his conviction from a felony to a misdemeanor, and to strike his strike priors under *Romero* and place him on probation. We conclude Hernandez forfeited this contention by failing to raise it during sentencing. Even if it were not forfeited, the contention would fail on the merits.

A. *Background*

In advance of the bifurcated prior conviction hearing and sentencing hearing, the prosecution filed a sentencing memorandum arguing Hernandez was ineligible for probation and subject to a Three Strikes sentence based on his prior convictions.

Hernandez filed a sentencing memorandum asking the trial court to exercise its discretion under section 17, subdivision (b) to reduce the current felony conviction to a misdemeanor,[16] and to strike his strike priors under *Romero* and grant him probation.

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16 A sentencing court has discretion to reduce a felony conviction to a misdemeanor for "wobbler" offenses (i.e., offenses that can be charged as either felonies or misdemeanors). (*People v. Tran* (2015) 242 Cal.App.4th 877, 885-886 (*Tran*).) It is an open question whether section 311.11 is a wobbler. The statute expressly states that every person who violates it "is guilty of a felony," but it also allows for "punish[ment] by imprisonment in . . . a county jail for up to one year," which is typically considered a

Hernandez denied the child pornography found on his computer belonged to him, claimed he did not condone it, and argued the files were a very small percentage of all the files on his computer. Hernandez acknowledged that his criminal history "is deserving of concern and attention" from the trial court, but he noted he performed satisfactorily on probation. He submitted several reference letters in support of this claim. Hernandez argued "unusual circumstances" warranted a grant of probation because his "current offense is far less serious than the priors . . . ."

The prosecution opposed Hernandez's requests, citing his "disturbing sexual interest in children," the "sheer number of images" involved, Hernandez's "lack of remorse and accountability," and his 12 prior convictions.

The probation report noted Hernandez's prior convictions rendered him presumptively ineligible for probation absent "unusual circumstances," and found there were none. The report stated that Hernandez's results on the Static-99R, described as an "actuarial measure of risk for sexual offense recidivism," placed him at "**Well Above Average Risk**" for reoffending. For sentencing purposes, the report cited Hernandez's prior convictions as a circumstance in aggravation. There were no mitigating circumstances.

At the outset of the sentencing hearing, the trial court stated it had read the parties' memoranda, the character letters submitted on Hernandez's behalf, and the probation

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misdemeanor punishment. (*In re Grant* (2014) 58 Cal.4th 469, 475, fn. 3.) We need not resolve this open question because even if the offense is a wobbler, we conclude the trial court did not abuse its discretion in denying Hernandez's request.

report. Hernandez then admitted his 12 prior convictions. Nine of Hernandez's relatives, friends, and coworkers spoke favorably on his behalf.

After hearing argument from counsel, the trial court denied Hernandez's requests and sentenced him under the Three Strikes Law to 25 years to life. In explaining its decision, the court noted that none of the people who spoke on Hernandez's behalf acknowledged the victims of the current offense. The court also noted that the demand for child pornography perpetuates child victimization. Ultimately, in light of the numerous victims of the current offense, the court concluded Hernandez's conduct was not "probation-worthy," but rather, fell within the spirit of the Three Strikes Law.

After pronouncing sentence, the court invited further comment from counsel. Defense counsel's only request was for the court to advise Hernandez of his appellate rights.

B. *Analysis*

Hernandez argues primarily that because it is an element of the offense under section 311.11 that there be a victim who is a child, the court's focus on harm to children when denying his sentencing requests constituted an impermissible double-counting of a sentencing factor. Hernandez forfeited this challenge by failing to raise it during sentencing. As the California Supreme Court has repeatedly stated, forfeiture "appl[ies] to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are . . . cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons."

(*People v. Scott* (1994) 9 Cal.4th 331, 353; see *People v. Boyce* (2014) 59 Cal.4th 672, 731 ["We recently affirmed this rule, and do so again."].) The reason for this doctrine is clear: "Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Scott*, at p. 353.)

The principles underlying forfeiture apply here. Had Hernandez timely expressed his view that the trial court was improperly double-counting the minor status of his victims, the trial court could easily have clarified the bases for its exercise of discretion. Because Hernandez failed to do so, he has waived this challenge on appeal.

Even if Hernandez had not forfeited this issue, it would fail on the merits. Requests to reduce a felony conviction to a misdemeanor and to strike a strike prior are left to the trial court's discretion. (See *Tran*, *supra*, 242 Cal.App.4th at pp. 885-886; *People v. Williams* (1998) 17 Cal.4th 148, 158.) In addition to the minor status of Hernandez's victims, the trial court cited the large number of victims. The court also stated it had considered the probation report, which indicated Hernandez was assessed as having a well above-average risk of reoffending. Under these circumstances, the trial court did not abuse its discretion by finding Hernandez's conduct was worthy of felony status and punishment under the Three Strikes Law.

DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.